

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN DAVID CLAYTON,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 245260

Oakland Circuit Court

LC No. 2000-172553-FH

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of sexual penetration by a Human Immunodeficiency Virus (HIV) infected person with an uninformed partner. MCL 333.5210. Defendant was originally sentenced as a fourth habitual offender, MCL 769.12, to a term of fifty-eight months' to fifteen years' imprisonment. The minimum sentence was within the guidelines range¹ of fourteen to fifty-eight months. Defendant appealed as of right and his conviction was affirmed, but the case remanded for resentencing.² The basis for the remand was an error in the scoring of the sentencing guidelines. This Court found that offense variable (OV) 3 should have been scored at zero instead of twenty-five points.

On remand, the guidelines were rescored and the corrected minimum range based on the reduction for the scoring of OV 3 was twelve to forty-eight months. After a resentencing hearing defendant was sentenced to a term of forty-eight months' to fifteen years' imprisonment. Defendant again appeals as of right, again challenging the scoring of the guidelines, but on different grounds.

At the resentencing hearing, defendant's counsel raised a new challenge to the prior record variables (PRV) scoring concerning two misdemeanor convictions that she claimed were

¹ The statutory guidelines apply in this case because the crime was committed after January 1, 1999. MCL 769.34(2).

² *People v Clayton*, unpublished opinion of the Court of Appeals, issued 9/13/02 (Docket No. 230328).

constitutionally defective. Counsel argued that defendant did not recall having or waiving an attorney when he pleaded guilty to these two offenses.

Defendant's PRV score originally totaled fifty points (PRV level E), which included scoring for nine misdemeanor convictions for which he received twenty points under PRV 5. The number of properly scored misdemeanors was reduced to seven because one was committed in 2000, after the current offense, and one involved a public safety violation which was not one of the enumerated categories of misdemeanors under PRV 5. However, defendant's total PRV score remained at fifty because the scoring for seven or more misdemeanors is twenty points.

At the resentencing hearing after remand from this Court, counsel claimed that among the seven remaining scored misdemeanors were two counselless misdemeanor convictions which resulted in incarceration and which should not have been scored. By deducting these two convictions the total misdemeanors would drop to five, the PRV 5 score would drop to fifteen and the total PRV score would drop to forty-five (PRV level D). Defendant's minimum guidelines range would then be ten to forty-six months.

The trial court denied defendant's challenge to the PRV 5 score, indicating that the case was before her because OV 3 was improperly scored. However, the court also indicated, "the Court does find there were two convictions," referring to the challenged misdemeanors.

Defendant's argument on appeal does not focus on the same two misdemeanors as were discussed at resentencing. At resentencing, counsel referred to two convictions in Redford district court (17th District Court). The Presentence Investigation Report (PSIR) shows that there were convictions in that court, one in 1996 for domestic assault, and one in 1998 for obstructing police. The representation made to the trial judge at the resentencing hearing was that both charges resulted in jail time. However, the PSIR indicates that the former charge resulted in a sentence of two years' probation or thirty days in jail and it is not clear that defendant ever served time on that charge. On appeal, defendant does not rely on the domestic violence charge, perhaps because there is no support for his argument that he went to jail on that charge. Instead, he relies on the obstruction charge for which he was sentenced to ninety days' in jail and a charge in 2000 which, as noted above, occurred after the current offense and which was not included in the scoring and which the trial judge never considered on resentencing. We are puzzled by defendant's claim regarding the already excluded 2000 charge and, in any event, do not consider it for purposes of this appeal.

On appeal, both parties attach to their briefs documents from the district court which purport to show that defendant either did or did not have or waive the right to counsel when offering guilty pleas to the two misdemeanor convictions in question. We take judicial notice of these documents under MRE 201 and find the prosecutor's submissions by far more persuasive, indeed they are conclusive.

Transcripts of defendant's arraignment, plea, and sentencing proceedings in the 17th District Court in 1998 along with an advice of rights form signed by defendant show that defendant voluntarily and knowingly waived his right to counsel on the police obstruction charge. Moreover, the transcripts reveal defendant as a person intimately familiar with the criminal justice system and one who is well aware of his constitutional rights. Accordingly, there is no merit to defendant's argument on appeal that his 1998 misdemeanor conviction

should have been excluded from the PRV 5 scoring. The trial court did not err in refusing to consider defendant's scoring challenge on resentencing after remand.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Pat M. Donofrio